Supreme Court, U.S.
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Case No. 92-1036

IN THE UNITED STATES SUPREME COURT

October-June 1992 Term

Lisle H. Moore, Jr., Petitioner

v.

Board of Education of Fulton Public School No. 58, Respondent

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On Petition for Writ of Certiorari
from the Supreme Court of Misssouri

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RESPONSE TO PETITIONER'S QUESTIONS PRESENTED

1. The allegations found in Petitioner's Question 1 are not presented by this case.

Petitioner's first question misrepresents the issue decided by the Missouri Supreme Court and the standard of review applied to that issue. The court did acknowledge the general principle that the granting or denying of a continuance rests in the sound discretion of the tribunal and will not be disturbed on appeal absent a showing of abuse of discretion. However, the court independently analyzed — as a question of law — whether the denial of the continuance at the precise moment it was requested in the hearing before the Board of Education was a violation of Petitioner's right to due process and therefore an abuse of discretion. The court found that the denial was not an abuse of discretion at that moment and that Petitioner's abandonment of the hearing deprived the court of the opportunity to determine whether a subsequent denial would have deprived Petitioner of his right to due process. Therefore, contrary to Petitioner's allegations the court did not defer to the Board of Education's discretion in determining whether Petitioner had received a fair hearing.

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OPINIONS BELOW

Petitioner omitted the following information regarding the opinions below:

On August 20, 1991, the Missouri Court of Appeals for the Western District, in Case No. 43955, captioned *Lisle H. Moore, Jr. v. Board of Education of Fulton Public School District No. 58*, issued its opinion reversing the judgment of the Circuit Court, and reinstating the decision of the Board of Education. However, opinions of the Missouri Court of Appeals in cases transferred to the Supreme Court of Missouri are not published in the permanent law reports. Therefore the opinion is not included herein as an appendix.

JURISDICTION

Petitioner cites only the relevant statute to invoke the Court's jurisdiction in this case. However, Petitioner has not offered any special or important reason, either in his jurisdictional statement or in his argument, why this case merits the Court's attention. Supreme Court Rule 10 provides as follows:

> .1. A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:
>
> . . . .
>
> (b) When a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals.
>
> (c) When a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

Petitioner has not alleged anywhere in his Brief that the decision of the Missouri Supreme Court conflicts with the decision of another state court of last resort or of a United States court of appeals. Nor does Petitioner contend that the Missouri Supreme Court decision conflicts with applicable decisions of this Court. Moreover, given the nature and specificity of the question it is unlikely that the Court has settled the specific question. Petitioner does allege that the question of federal law presented in this case should be decided by the Court. However, Petitioner has failed to provide any substantive reasons, much less persuasive ones, why the issue in this case may correctly be characterized as "an important question of federal law."

STATEMENT OF THE CASE

Petitioner has omitted several material facts from his Statement of the Case. First, at the hearing before the Board of Education, Petitioner had testified before the continuance was requested. During Petitioner's testimony, he admitted that he had operated a bail bond business on school property during school hours (Tr. at 60-62; Pet. Appendix at 23-28),[1] that he had repeatedly left students unsupervised in direct violation of Board policy (Tr. at 68-69; Pet. Appendix at 17, 18, 28), that he had refused to follow the directives of the Superintendent of Schools and the high school Principal to reinstate a student to band (Tr. at 24-29; Pet. Appendix at 19), and that he had cursed the Principal in front of students (Tr. at 39-41; Pet. Appendix at 19). In addition, Petitioner had presented the testimony of five of his witnesses prior to the denial of the continuance. (Tr. at 129-199.)

Petitioner suggests that the Board denied his request for a continuance following a single sentence recommending denial of the continuance by District's counsel. However, the record shows that the Board listened to argument from both counsel before reaching a final decision to deny Petitioner's request. Most important, however, the Board merely denied the continuance at the time it was requested — following the direct examination of the high school Principal and prior to his cross-examination. The Board did not state that a continuance would be denied if Petitioner renewed his request at a more appropriate time. Instead of remaining at

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[1] Citations are designated as follows: Transcript of the Hearing Before the Board of Education, "Tr. at ___"; Petitioner's Appendix, "Pet. Appendix at ___."

the hearing, and requesting a continuance at the conclusion of the cross-examination, Petitioner and his attorneys abandoned the proceeding.

ARGUMENT

Point 1: Standard of Review

Question presented: Whether the Missouri Supreme Court applied an inappropriate standard of review of an administrative decision when the court deferred to the Respondent Board of Education's discretion in determining whether Petitioner received a fair hearing.

Petitioner's first question misrepresents the issue decided by the Missouri Supreme Court and the standard of review applied to that issue. The court did acknowledge the general principle that "[t]he granting or denying of a continuance rests in the sound discretion of the tribunal and will not be disturbed on appeal absent a showing of abuse of that discretion." (Pet. Appendix at 46.) However, the court independently analyzed — as a question of law — whether the denial of a continuance, at the precise moment it was requested in the hearing before the Board of Education, was a violation of Petitioner's right to due process and therefore an abuse of discretion. *Id.* at 43-44. The court found that the Board's decision to proceed with the cross-examination of the witness testifying at the time the request was made was not unreasonable and therefore was not an abuse of discretion. *Id.* at 48. The opinion further stated that Petitioner's abandonment of the hearing deprived the court of the opportunity to determine whether a subsequent denial of a continuance would have deprived Petitioner of his right to due process. *Id.* at 47. Therefore, the Missouri Supreme

Court did not defer to the Board of Education's discretion in determining whether Petitioner had received a fair hearing.

The foregoing discussion establishes that Petitioner's first question is not presented in this case and should not be considered by the Court in deciding whether to grant the instant Petition for Writ of Certiorari. Respondent will nevertheless address Petitioner's argument in detail for two reasons: (1) to clarify why Petitioner's question is not presented in the instant case and (2) to preserve Respondent's right to address the issues included in the question if necessary in the future. Respondent further notes that much of Petitioner's argument under his first "Question Presented" is devoted to a substantive discussion of why the Board's denial of the continuance allegedly constituted a violation of due process. This portion of the argument would more properly appear under Petitioner's second "Question Presented." To facilitate comparison of the parties' arguments, however, Respondent will address each of Petitioner's arguments under the Question in which they appear in his Brief.

Petitioner's argument is premised upon (1) a misstatement of the Missouri Supreme Court's opinion in this case and (2) speculation about what might have occurred if Petitioner had remained and requested a continuance after the cross-examination of the witness then on the stand. First, Petitioner contends that the court did not review the Board's decision to deny the continuance as a question of law.[2]

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[2] Petitioner cites *Wolfe v. Missouri State Training School for Boys*, 517 S.W.2d 138 (Mo. 1974) (en banc), to suggest to this Court that either Respondent or the Missouri Supreme Court has espoused the position that decisions of administrative bodies on questions of law are binding upon

Petitioner further alleges that the Court deferred to the Board's decision that it had granted Petitioner a fair hearing. However, Petitioner's argument ignores the plain language and carefully stated logic of the opinion.

The court set forth the following due process analysis:

1. Petitioner must have a property interest to be entitled to invoke the mandate of procedural due process.
2. The Missouri Teacher Tenure Act conferred a property interest in his employment as a permanent teacher.
3. Thus, Petitioner was entitled to due process.
4. Due process requires notice and an opportunity for a hearing before a person may be deprived of his property interest.
5. The opportunity to be heard must be at a meaningful time and in a meaningful manner.

After setting forth its analysis, the court identified the dispositive issue in the case: "[W]hether the failure to grant the continuance deprived [Petitioner] of a fair hearing because he was not given the opportunity to be heard at a meaningful time and in a meaningful manner." (Pet.

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reviewing courts. Respondent has never taken this position, nor was it embodied in the Missouri Supreme Court's opinion. The long-standing and well-settled law of Missouri is directly to the contrary. *Franklin v. Board of Directors, School District of Kansas City*, 772 S.W.2d 873, 878 (Mo. Ct. App. 1989) ("the Court is not bound by the Board's decisions concerning questions of law").

Appendix at 43-44.) The first step in the court's analysis was to determine whether Petitioner had waived his right to due process by leaving the hearing. The court found that if Petitioner's due process rights had been violated prior to his abandonment of the hearing, he had not waived his right to due process. *Id.* at 44.

Therefore, the court next examined whether, as a matter of law, Petitioner had received a fair hearing that complied with due process up to the point at which he left the hearing. The court rejected two of the Board's arguments as a matter of law: (1) that a shortage of time before the impending Board election required the hearing to be completed promptly, and (2) that granting a continuance would not have changed the outcome of the hearing. *Id.* at 44-46.

Continuing its analysis, the court acknowledged the general principle that "[t]he granting or denying of a continuance rests in the sound discretion of the tribunal and will not be disturbed on appeal in the absence of a showing of abuse of that discretion." *Id.* at 46. The court then analyzed whether, as a matter of law, the Board had abused its discretion. The opinion set forth the legal standard for abuse of discretion: an "untenable judicial act that defies reason and works an injustice." *Id.* (citing *Jennings v. City of Kansas City*, 812 S.W.2d 724, 736 (Mo. Ct. App. 1991)). The court then applied that legal standard to the facts of the case.

First, the court found the evidence did not support Petitioner's contention that the denial of the request inevitably meant that the hearing would continue to completion. Board's own counsel acknowledged that the hearing might not be completed in one night. In addition, it was not unusual for a tribunal to make every effort to try to complete both the direct and cross-examination of the witness

on the stand before adjourning. Therefore, the possibility existed that a subsequent request for a continuance, made at a more appropriate time in the hearing, would have been granted. *Id.* at 46-47.

Second, the court found that mere lateness of the hour was insufficient to establish a violation of due process without some evidence that Petitioner, his counsel, or witnesses were unable to perform their duties in a meaningful way. The court noted that the record was silent with regard to potential prejudice. *Id.* at 47.

Finally, the court stated that Petitioner's decision to abandon the hearing deprived the court "of the opportunity to find out whether the Board would actually have required him to go forward with his own case and complete the hearing without a continuance." *Id.*

The court found that based upon the evidence in the record, Petitioner had failed to carry his burden of demonstrating that the Board's denial of the continuance was a clear abuse of discretion. The court indicated the Petitioner had no one but himself to blame for his failure to carry that burden. Petitioner had failed to enter any evidence of prejudice into the record at the time of the initial denial of his request, and had abandoned the hearing rather than renewing his request at the close of the principal's cross-examination. *Id.* at 47-48.

The foregoing exposition unequivocally establishes that the court's opinion does not rest upon deference to a purported determination by the Board that it had granted Petitioner a fair hearing. The court's opinion is a carefully reasoned analysis of whether, as a matter of law, the Board's denial of the continuance at the time it was requested deprived Petitioner of his right to due process.

Petitioner interjects several ancillary issues under his first "Question Presented." However, these issues are

irrelevant to the question of whether the Missouri Supreme Court used the proper standard of review. Furthermore, Petitioner has misinterpreted or misapplied each of the cases he cites for his propositions.

Petitioner asserts that members who were not yet elected to the Board of Education could have participated in the vote regarding the termination of Petitioner's employment. This contention is irrelevant because the Missouri Supreme Court specifically rejected the Board's argument that time constraints created by the election justified denial of the continuance. Furthermore, the case cited by Petitioner, *Webb v. Kansas City Board of Police Commissioners*, 736 S.W.2d 451 (Mo. Ct. App. 1987), is not analogous to the instant case. In *Webb*, the agency's decision was remanded for more detailed findings of fact, which were rendered more than three years after the original employment decision had been made. New members of the board, as well as a retired member who had participated in the original decision, signed the new decision and findings. *Id.* at 452. The resolution was an ad hoc arrangement born of necessity and does not support the argument that one board may hear the evidence in an employment matter and a different board may render the original decision a few weeks later.

Petitioner next cites *Forehand v. School Board of Gulf County*, 600 So. 2d 1187 (Fla. Dist. Ct. App. 1991), for his contention that the Board's attorney should not have acted as prosecutor of the case and as legal advisor to the Board. This issue was not addressed by the Missouri Supreme Court and is not part of this case. Moreover, the issue has been settled by Missouri courts in accordance with Missouri law.

> "[T]he active participation of a school board's attorney in the conduct of a hearing . . . does not in itself deprive one of a fair trial; . . . .

> (Citations omitted.) Absent a showing in the record that, as a result of the attorney's participation, the Board heard the evidence with an unbendable or preconceived notion that petitioner was guilty as charged, no denial of a fair trial occurred."

Ross v. Robb, 662 S.W.2d 257, 260 (Mo. 1983) (en banc). Even if the issue were relevant and part of this case, Petitioner has not offered one shred of evidence that the Board's attorney created among the members of the Board "an unbendable or preconceived notion that Petitioner was guilty as charged."

Petitioner's third ancillary contention is that the Board wanted to decide the case promptly to use the outcome for political advantage. Again, this issue was not addressed by the Missouri Supreme Court and is not part of this case. Furthermore, Petitioner is engaging in the wildest form of speculation about the motivation of the members of the Board. It is equally consistent to presume that some members might have preferred to postpone the vote until after the election to defer criticism for their decision. Petitioner cites *Vance v. Lopez*, 509 S.W.2d 197 (Mo. Ct. App. 1974), in an attempt to bolster his suggestion that the Board had some ulterior motive for wishing to complete the hearing in a reasonable length of time. *Vance* does stand for the proposition that politics has no role in deciding whether a teacher should be discharged and that such decision should be based on merit. *Id.* at 202. However, the questions before this Court do not contain any allegation that the decision to terminate Petitioner was made on any other basis than his absence of merit.

In addition, Petitioner maintains that Board findings 76 and 78 confirm that the Board wanted to reach a decision before the election, and the findings therefore lead to the

ineluctable conclusion that the Board intended to conduct the hearing to its completion in one session. However, Board findings 76 and 78 are not inconsistent with the desire to proceed with the hearing for a while at the time Petitioner requested a continuance, followed by a decision to grant a continuance later in the hearing.

Finally, Petitioner suggests that the hearings should have been conducted over a series of evenings as a matter of law. However, Petitioner merely recites the facts of *Saunders v. Reorganized School District No. 2 of Osage County*, 520 S.W.2d 29 (Mo. 1975), and compares the length of the transcripts in each case to support her position. Recitation and comparison of facts does not constitute legal precedent.

Petitioner correctly states that the question of whether a hearing is fair and properly conducted is for the courts. That is exactly where the question of whether Petitioner received a fair hearing was decided. The Missouri Supreme Court set forth a comprehensive legal analysis to determine if the Board had abused its discretion. The court then applied that analysis to the facts of Petitioner's case. Petitioner merely disagrees with the result of that analysis. The court did not defer to any determination by the Board that it had provided a fair hearing. The court rendered a judgment on the facts in accordance with the law. This is not a "manifest injustice." On the contrary, it is "Equal justice under the law": the standard to which every tribunal should aspire.

Point 2: Due Process

Question presented: Whether Respondent Board of Education violated Petitioner's right to due process under the 14th Amendment to the United States Constitution when the Board denied Petitioner's request for a continuance of Petitioner's employment termination hearing when such request was made at 2:15 a.m. following seven and one-half hours of hearing.

At the beginning of Petitioner's second point, he urges the Court to look at substance to determine whether constitutional minimums have been honored. However, Petitioner's entire argument on this point relies upon speculation about what might have occurred if Petitioner and his attorneys had not abandoned the hearing. Petitioner cites no authority to support his contention that the denial of the continuance at the conclusion of the Principal's direct examination deprived him of due process.[3]

Petitioner invites this Court to grant its Petition because the Missouri Supreme Court noted in dicta that if Petitioner had remained, and the Board had denied a later request for a continuance, Petitioner's due process rights most likely would have been violated. Petitioner punctuates this invitation with an assertion that the record is clear that

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[3] Petitioner asserts that during the process of his appeal, no cases have been found with facts analogous to Petitioner's case. However, Petitioner pointedly ignores *Bills v. Arizona State Board of Education*, 819 P.2d 952 (Ariz. Ct. App. 1991), which was cited and discussed by the Missouri Supreme Court.

Petitioner would have been required to remain throughout the night and into the next day if he had not abandoned the hearing. However, Petitioner ignores the Missouri Supreme Court's specific finding to the contrary. The court emphasized that the evidence established that a subsequent request for a continuance might have been granted.

Furthermore, the Missouri Supreme Court emphasized that Petitioner's own conduct and the conduct of his attorneys had prevented the court from having the necessary record to determine if Petitioner's rights had or would have been violated. First, the record contained no evidence of actual prejudice by the denial of Petitioner's only request for a continuance. Second, "[Petitioner's] decision to abandon the hearing deprives us of the opportunity to find out whether the Board would actually have required him to go forward with his own case and complete the hearing without a continuance." (Pet. Appendix at 47.) Third, the burden of demonstrating that denial of the continuance was an abuse of discretion rested on Petitioner. Petitioner failed to carry that burden.

Petitioner also fails to carry his burden before this Court. He has not cited a single case to support his argument. Therefore the Court should apply the standard set out in *Birdwell v. Hazelwood School District*, 491 F.2d 490, 495 (8th Cir. 1974), to the present case:

> The fundamental requirement of due process "is the opportunity to be heard . . . . 'The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation.'"
>
> The opportunity thus demanded was here afforded but [Petitioner] deliberately chose not to avail himself of it . . . . He cannot now scour the record of the hearing he

> thus ignored for flaws in its conduct. We find a voluntary and knowing waiver.

Id. (citations omitted).

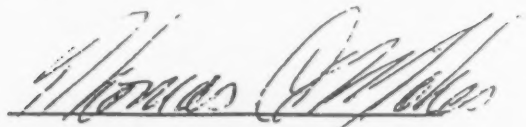
Petitioner voluntarily absented himself from the hearing. Petitioner may not now ask this Court to compensate for his bad judgment by finding that the Board would have violated his right to due process if he had remained.

CONCLUSION

Respondent respectfully requests this Court to deny the instant Petition for Writ of Certiorari to United States Supreme Court. The Missouri Supreme Court properly reviewed the issue of whether the Board abused its discretion in denying the continuance as a question of law. The court determined that the Board had not abused its discretion because (1) the request was made at an inappropriate time during the hearing, (2) the possibility was left open that the hearing would not be completed in one session, and (3) Petitioner failed to offer any evidence of prejudice resulting from the denial. The court found that Petitioner's due process rights had not been violated prior to his abandonment of the hearing and refused to engage in speculation about whether his rights would have been violated if he had remained. Petitioner, and others in similar situations, may not abandon proceedings in which they have received an opportunity to be heard and then look to the courts for protection.

Wherefore, for all the foregoing reasons, Respondent respectfully requests this Court to deny the instant Petition for Writ of Certiorari.

Respectfully submitted,



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